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No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....1

ARGUMENT 2

I. THE GRANT OF EXCLUSIVE VISITORIAL POWERS IN SECTION 484, VIEWED IN THE CONTEXT OF THE OCC'S BROAD AUTHORITY UNDER FEDERAL LAW, ENCOMPASSES THE ENFORCEMENT OF APPLICABLE LAWS AGAINST NATIONAL BANKS. 4

A. The OCC Has Broad Authority Under Federal Law To Examine, Require Reports From, And Enforce Applicable Laws Against National Banks. 4

B. The Structure And History Of Section 484(a) Confirm That The OCC's Exclusive Visitorial Powers Encompass Enforcement Of All Applicable Laws. 7

C. This Court's Cases Confirm That The OCC's Exclusive Visitorial Authority Reaches Enforcement Of All Applicable Laws. 9

II. THE HISTORY OF PUBLIC VISITATION OF CIVIL CORPORATIONS CONFIRMS THAT THE PHRASE "VISITORIAL POWERS" IN SECTION 484 INCLUDES AUTHORITY TO ENFORCE APPLICABLE FEDERAL AND STATE LAWS AGAINST NATIONAL BANKS. 13

A. Early Scholarship Confirms That Public Visitation Over Civil Corporations Extends To Their External Activities. 14

B. Contemporary Case Law Likewise Shows That Public Visitation Over Civil Corporations By The Sovereign Includes The Authority To Correct Public Wrongs. 16

C. The Court Should Reject Petitioner's Attempt To Confuse Public And Private Visitation. 18

D. Preemption Under The National Bank Act Does Not Turn On Whether A State Banking Regulation "Externalizes Costs." 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Astoria Federal Sav. & Loan Association v. Solimino, 501 U.S. 104 (1991) 7

Attorney General v. Albion Academy, 52 Wis. 391 (1881) 18

Attorney General v. Chicago and Northwestern Rwy. Co., 35 Wis. 425 (1874) 16, 17, 18

Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959) 12

Farmers' & Mechanics National Bank v. Dearing, 91 U.S. 29 (1875) 3

First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924) 12, 13

First National Bank of Bay City v. Fellows, 244 U.S. 416 (1917) 12, 13

Franklin National Bank of Franklin Square v. New York, 347 U.S. 373 (1954) 22, 23

First National Bank v. Hughes, 6 Fed. Cas. 737 (1881) 9

Guthrie v. Harkness, 199 U.S. 148 (1905) 4, 9, 10

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 3

Tiffany v. National Bank of Mo., 85 U.S. (18 Wall.) 409 (1873) 2

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 15

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 10, 11, 12

STATUTES

12 U.S.C. § 36(f)(1) 6

12 U.S.C. § 93 5

12 U.S.C. § 161 5

12 U.S.C. § 481 5

12 U.S.C. § 484 ..... *passim*

12 U.S.C. § 1818(b)(1) 6

Mich. Comp. Laws Ann. § 445.1663(2) 10

Mich. Comp. Laws Ann. § 445.1661 10

REGULATIONS

12 C.F.R. § 7.4000(a)(2)(2006) 11

OCC Final Rule, 69 Fed. Reg. 1895, 1899 13

CONGRESSIONAL AND EXECUTIVE MATERIALS

Cong. Globe, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864) 3

Hearings Before the Senate Comm. on Banking and Currency, 63d Cong., 1st Sess. 1322 (1913) 8

29 Op. Atty. Gen. 555 (Nov. 9, 1912) 9

MISCELLANEOUS

Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations* (4th ed. 1852) 20

William Blackstone, *Commentaries on the Laws of England* (1765) 14, 15

Bouvier's Law Dictionary (6th ed. 1856) 9

Charles B. Elliott, *A Treatise on the Law of Private Corporations* (3d ed. 1900) 21

Lawrence Friedman, "A History of American Law," *in The Business Corporation* (3d ed. 2005) 19

James Kent, *Commentaries on American Law* (1827) 15, 19, 20

S.S. Merrill, *Law of Mandamus* (1892) 9

Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369 (1936) 15, 16, 17

Seymour D. Thompson, *Commentaries on the Law of Private Corporations* (2d ed. 1908) 16, 21

INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.[1] Roundtable member companies account directly for more than 2.3 million jobs and more than $85.5 trillion in managed assets. Many of the Roundtable's members have national bank subsidiaries that have a direct interest in the uniform enforcement of applicable law with respect to their banking activities by the Office of the Comptroller of the Currency ("OCC"). For these reasons, the Financial Services Roundtable is filing this brief as an *amicus curiae* to urge the Court to affirm the judgment of the Second Circuit.

SUMMARY OF ARGUMENT

Congress has granted the OCC exclusive "visitorial powers" over national banks pursuant to 12 U.S.C. § 484(a). If New York's actions constitute visitation for purposes of Section 484(a), they are barred by federal law unless one of the exceptions to Section 484 applies.

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[1] Pursuant to this Court's Rule 37.6, The Financial Services Roundtable states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than The Financial Services Roundtable, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from Petitioner and Respondents consenting to the filing of this brief have been lodged with the Clerk.

Petitioner and his amici attempt to redefine the historical meaning of "visitorial powers" to exclude Petitioner's actions in this case. Because Petitioner seeks to exercise wide-ranging examination and enforcement authority over national banks, the only way in which Petitioner and his amici can square their position with the language of Section 484 is to argue that the phrase "visitorial powers" in Section 484 is limited to policing national banks' adherence to their corporate charters and bylaws. *See* Pet. Br. 25; Br. of Connecticut Fair Housing Center ("CFHC Br.") 5-6. This cramped "internal affairs" reading of "visitation" finds no basis in the text, structure or history of the National Bank Act. Nor does it find support in the common law history of visitation over civil corporations. The historical evidence shows that the government, as visitor of civil corporations, is authorized to correct all misbehaviors of the corporation relating to public wrongs. Such state visitation—including Petitioner's conduct in this case—is precluded by Section 484.

ARGUMENT

To protect national banks against potentially hostile state actions, the National Bank Act establishes national banks as "National favorites" and shields them from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873). Under the National Bank Act, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single

State cannot give.'" *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819)).

The limitation on visitorial powers in Section 484 is one of the provisions enacted by Congress in 1864 to shield national banks from state control. Congress was aware of the earlier history of state hostility to the First and Second Banks of the United States, and it was foreseeable that new frictions would arise from the new national bank system.[2] This history, which is reflected in the text and structure of the National Bank Act, refutes the argument by Petitioner and his amici that the phrase "visitorial powers" in Section 484 is limited to supervising the "internal affairs" of national banks. *See* Pet. Br. 24-25; CFHC Br. 6-25. Petitioner's argument is also contrary to the common-law history of public visitation of civil corporations.

[2] *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864) (statement of Sen. Sumner) (comparing potentially hostile use of state laws against national banks to the Maryland tax invalidated by the Court in *McCulloch*).

I. THE GRANT OF EXCLUSIVE VISITORIAL POWERS IN SECTION 484, VIEWED IN THE CONTEXT OF THE OCC'S BROAD AUTHORITY UNDER FEDERAL LAW, ENCOMPASSES THE ENFORCEMENT OF APPLICABLE LAWS AGAINST NATIONAL BANKS.

Congress's grant of exclusive visitorial powers to the OCC in 12 U.S.C. § 484(a) does not exist in a statutory vacuum. Section 484 is part of an integrated set of congressional enactments that collectively constitute a "full and complete provision" of authority to the OCC. *Guthrie v. Harkness*, 199 U.S. 148, 159 (1905). Congress has granted the OCC comprehensive authority to supervise and examine national banks and to enforce applicable federal and state laws and regulations. The text of these provisions, as well as the structure and history of Section 484(a) itself, make clear that the OCC's visitorial powers include authority to examine national banks for possible violations of applicable state laws and to enforce applicable state laws against national banks if violations are found.

A. The OCC Has Broad Authority Under Federal Law To Examine, Require Reports From, And Enforce Applicable Laws Against National Banks.

The National Bank Act grants the OCC broad authority to require reports from national banks, to examine all bank activities, and to enforce any applicable law against national banks and

institution-affiliated parties. The relevant provisions of the National Bank Act include not only an affirmative grant of visitorial powers enacted contemporaneously with Section 484(a), but also additional exclusive enforcement authority that Congress has conferred on the OCC in the ensuing 150 years. The relevant statutory provisions include the following:

- **12 U.S.C. § 161.** This provision, enacted in 1864 along with Section 484(a) as part of the National Bank Act, provides that "[e]very association shall make reports of condition . . . " to the OCC. Section 161 also grants the Comptroller authority to require any additional reports "necessary for his use in the performance of his supervisory duties." *Id.* The OCC is required to obtain "not less than four reports during each year" from national banks regarding their relations with affiliates. *Id.*

- **12 U.S.C. § 481.** This provision, also enacted at the same time as Section 484(a), grants the OCC the "power to make a thorough examination of all the affairs of the [national] bank" and its affiliates.

- **12 U.S.C. § 93.** This provision, which also dates back to 1864, authorizes the OCC to take action against national banks and institution-affiliated parties if there is a "knowing[]" "violat[ion of] any of the provisions" of the National Bank Act.

- **12 U.S.C. § 1818(b)(1).** This provision, enacted in 1966, adds to the OCC's powers by granting the agency authority to bring administrative cease and desist proceedings against any national bank or institution-affiliated party for violating any "law, rule, or regulation," including applicable state laws, rules and regulations.

- **12 U.S.C. § 36(f)(1)(B).** This provision, enacted in 1994, expressly provides that "[t]he provisions of any State law to which a branch of a national bank is subject . . . shall be enforced, with respect to such branch by the Comptroller of the Currency." By its terms, this provision makes the OCC the exclusive enforcer of non-preempted state law as to national bank branches outside their home states, including specifically, OCC enforcement of applicable state fair lending laws. *See id.* § 36(f)(1)(A).

Collectively, these federal statutory provisions provide the OCC with comprehensive visitorial authority over all national bank activities, including authority to enforce applicable federal and state laws against national banks and institution-affiliated parties. It is this comprehensive visitorial authority that Congress consistently has sought to protect from state intrusion.

B. The Structure And History Of Section 484(a) Confirm That The OCC's Exclusive Visitorial Powers Encompass Enforcement Of All Applicable Laws.

Petitioner's narrow "internal affairs" reading of the visitorial powers described in Section 484(a) would render the exceptions in Section 484 superfluous, contrary to a well-established principle of statutory interpretation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("We construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

For instance, Section 484(b) provides: "*Notwithstanding subsection (a) of this section*," States are authorized to "review [a national bank's] records" "solely to ensure compliance with applicable State unclaimed property or escheat laws." (Emphasis added). Under Petitioner's "internal affairs" reading of Section 484(a), a state official's examination and enforcement of applicable escheat law would not be "visitation" at all because it deals with the national bank's external affairs. Thus, under Petitioner's proposed interpretation, Section 484(b) is surplusage.

Likewise, the exception to the OCC's exclusive visitorial powers for congressional committees set forth in Section 484(a) does not relate solely to the inspection of national banks' internal affairs. The history of this provision confirms that Congress understood the OCC's visitorial powers to extend to external as well as internal affairs. The exception

for congressional committees was enacted in 1913 to overcome objections that Section 484 barred Congress from requesting information directly from a national bank relating to national banks' *external* activities – specifically, allegations that national banks were engaged in collusive and risky "money trust" behavior. *See Hearings Before the Senate Comm. on Banking and Currency*, 63d Cong., 1st Sess. 1322 (1913) (testimony of Mr. Untermyer, Counsel to the Senate Committee on Banking and Currency).[3] Congress amended Section 484(a) after Attorney General Wickersham issued an opinion concluding that, while the OCC was authorized to

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[3] *See also id.*:

> "We found in the Pujo inquiry [into "money trust" activities of banks] that when the committee wanted to find out about the conduct of the banks, the loans to officers and other abuses, for the purpose of determining what legislation should be suggested by way of amendment to the banking laws, they were met by the bankers with the objection that the Comptroller of the Currency is the only officer of the Government who is subject to no sort of restriction whatever; that Congress, it was said, had delegated the visitorial power over its own regulation of the banks to the Comptroller of the Currency, and had no longer any power to investigate its own creatures. That is the extraordinary situation created by that provision [§ 484] of the banking law. The visitorial power over the banks is vested solely in the Comptroller of the Currency, and Congress can not investigate the banks and find out what they are doing as a basis for remedial legislation. My suggestion is that that amendment which passed the House at the last session should be inserted here on page 20 of the bill, so that if the Congress wants to examine into the powers of its own creation it may be permitted to do so. The present situation is intolerable."

gather the information at issue for its own purposes, Congress could not direct the OCC to gather the information for congressional purposes. *See* 29 Op. Atty. Gen. 555 (Nov. 9, 1912).

Petitioner's "internal affairs" interpretation of visitorial powers converts the exceptions in Section 484 into surplusage. Petitioner's interpretation thus violates the basic principle that courts should give effect to all the provisions of a statute if it is fairly possible to do so.

C. This Court's Cases Confirm That The OCC's Exclusive Visitorial Authority Reaches Enforcement Of All Applicable Laws.

This Court has construed the scope of 12 U.S.C. § 484(a) in two prior cases. In *Guthrie v. Harkness*, 199 U.S. 148, 157 (1905), the Court described visitation as "'[t]he act of examining into the affairs of a corporation,'" *id.* (quoting 2 *Bouvier's Law Dictionary* 1199 (6th ed. 1856)), and "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance to its laws and regulations," *id.* at 158. In doing so, the Court noted that the term "visitation" "mean[s] 'inspection; superintendence; direction; regulation." *Id.* (quoting *First National Bank v. Hughes*, 6 Fed. Cas. 737 (1881)). *See also id.* ("Visitors of corporations" are authorized "to correct all abuses of authority, and to nullify all irregular proceedings.") (quoting S.S. Merrill, *Law of Mandamus* § 175, at 213 (1892)). The Court explained that "visitation [is] a public

right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers . . . ." *Id.* at 158-59. In addition, the Court observed that "Congress had in mind, in passing [Section 484], that in other sections of the law it had made a full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Id.* at 159. *See also* Part I.A, above.

More recently, this Court considered Section 484(a) in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). In *Watters*, the Court addressed whether Michigan could exercise "general supervision and control" over a national bank operating subsidiary, including authority "to investigate consumer complaints and take enforcement action if [the state official] finds that a complaint is not 'being adequately pursued by the appropriate federal regulatory authority.'" 550 U.S. at 8 (quoting Mich. Comp. Laws Ann. § 445.1663(2)). The Michigan laws at issue in *Watters* expressly provided for enforcement by the state Attorney General. *See* Mich. Comp. Laws Ann. § 445.1661.

In *Watters*, the Court defined "visitation" by quoting from both *Guthrie* and the OCC's visitorial

powers regulation, 12 C.F.R. § 7.4000(a)(2)(2006).[4] *See* 550 U.S. at 13-16. Based on this definition, the Court stated that "Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.

The Court held that the National Bank Act "spare[s] a national bank from state controls of the kind here involved." *Id.* at 13. The Court's opinion in *Watters* observes that "State laws that . . . subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate. Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the [National Bank Act] was designed to prevent." *Id.* at 13-14

The Court's decision in *Watters* would be devoid of meaning under an "internal affairs" construction of Section 484(a)'s "visitorial powers." *Watters* arose from the efforts of state regulators to enforce state

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[4] The OCC's regulation defines "visitorial power" as: "'(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities.'" 550 U.S. at 14, quoting 12 C.F.R. § 7.4000(a)(2) (2006).

laws. There was no contention in *Watters* that the operating subsidiaries had violated their corporate charters or bylaws. Indeed, in *Watters*, it was understood that the *state*, not the OCC, would regulate the "internal governance" of operating subsidiaries, which are *state-chartered* corporations. 550 U.S. at 21.[5]

This Court's decisions, therefore, squarely reject the narrow view of visitation propsed by Petitioner and his amici.[6]

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[5] Petitioner's narrow interpretation of visitorial powers cannot be squared with this Court's use of that term in *Watters*. As the Court there observed, the corporate governance of the North Carolina-chartered corporation at issue in *Watters* was controlled by the law of North Carolina. *See id.* at 21. Under Petitioner's theory, the only state that could exercise "visitorial" authority over that corporation would be North Carolina, not Michigan. CFHC Br. 24 n.8. Yet the Court's opinion and the dissenting opinion in *Watters* both described the application of Michigan's statutes to the North Carolina corporation as "visitorial." *See id.* at 14-15; *id.* at 34-35 (Stevens, J., dissenting).

[6] Neither *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), nor *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), addressed Section 484. In both cases, courts exercised their equitable powers to review administrative actions of a federal agency construing the powers of national banks. This Court has instructed that such equitable remedies must be reevaluated in light of the expanded availability of legal remedies for administrative action, including judicial review pursuant to the Declaratory Judgment Act and the Administrative Procedure Act. As this Court explained in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 509 (1959), "[s]ince in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-
(...continued)

II. THE HISTORY OF PUBLIC VISITATION OF CIVIL CORPORATIONS CONFIRMS THAT THE PHRASE "VISITORIAL POWERS" IN SECTION 484 INCLUDES AUTHORITY TO ENFORCE APPLICABLE FEDERAL AND STATE LAWS AGAINST NATIONAL BANKS.

The history of public visitation of civil corporations confirms that Petitioner's narrow reading of visitation is incorrect. Petitioner and his amici confuse *private* visitation of charities and ecclesiastical institutions with *public* visitation of civil corporations. Public visitation of civil corporations, rather than private visitation of charities and ecclesiastical institutions, provides a more appropriate historical analog to the OCC's

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evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, Quia Timet and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules."

The equitable review and remedies accorded to the states in *St. Louis* and *Bay City* are no longer warranted given the dramatic expansion of judicial review of agency actions via the Declaratory Judgment Act and the APA, as well as the waiver of sovereign immunity accorded in section 706 of the APA to allow such actions to be brought directly against the agency itself rather than the national bank. *Compare* OCC Final Rule, 69 Fed. Reg. 1895, 1899 ("The principal means in use today for testing the application of state law to national banks – declaratory judgment – was unavailable to the states prior to the enactment of the Declaratory Judgment Act . . . . If this type of action had been available at the time of the *St. Louis* case, there would have been no need for the state to bring a *quo warranto* action.").

visitation of national banks. Petitioner's analogy to private visitation erroneously narrows the scope of the OCC's exclusive visitorial powers.

A. Early Scholarship Confirms That Public Visitation Over Civil Corporations Extends To Their External Activities.

In advancing their "historical" argument that visitation is limited to an institution's internal affairs, Petitioner and his amici omit any reference to the most influential of all common law treatises, that of Sir William Blackstone. Blackstone confirms that the sovereign's "visitation" of civil corporations extends to correcting "all misbehaviours" of the corporation:

> The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, *all misbehaviours* of this kind of corporations are enquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, *according to the rules of the common law*, they ought not to be visited elsewhere, or by any other authority.

1 William Blackstone, *Commentaries on the Laws of England* *469 (1765) (emphasis added). *See also* 2 James Kent, *Commentaries on American Law* 241 (1827) ("visitation of civil corporations is by the government itself, through the medium of the courts of justice.").[7]

Dean Pound similarly concludes that visitorial jurisdiction "lies to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters, *or under statutes or ordinances or imposed by the common law*." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 375 (1936) (emphasis added, footnote omitted). Petitioner simply ignores this statement by Dean Pound. One of Petitioner's amici quotes part of the statement, but inserts a period in place of the language quoted in italics above and cites Dean Pound in support of the proposition that "Leading treatises affirm the internal affairs understanding [of visitorial powers]." CFHC Br. 11-12. As the full quotation shows, Dean Pound's article not only fails to support the "internal affairs" interpretation, but refutes that interpretation.[8]

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[7] In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Court concluded that Dartmouth College was a private eleemosynary institution. Justice Story cited and relied on Blackstone for the proposition that there is "a power to visit, inquire into, and correct *all* irregularities and abuses in such corporations." *Id.* at 674 (opinion of Story, J., citing 1 Blackstone's *Commentaries* 480 (emphasis added)).

[8] Early treatise writers recognized that certain regulated industries – including railroads and banking – became subject to comprehensive "visitatorial powers" by governmental (...continued)

B. Contemporary Case Law Likewise Shows That Public Visitation Over Civil Corporations By The Sovereign Includes The Authority To Correct Public Wrongs.

In what Dean Pound called "the leading case for visitatorial powers in equity," Pound, *supra*, at 380, *Attorney General v. Chicago and Northwestern Rwy. Co.*, 35 Wis. 425 (1874) (hereinafter the "*Railway Companies*" case), the Wisconsin Supreme Court reviewed American and English law over the first half of the Nineteenth Century and concluded that equity jurisdiction had evolved to permit state attorneys general to go to court to correct public wrongs, not solely to police a corporation's internal affairs.

In the course of reviewing the state attorney general's authority to bring suit against the companies, the court found that "the authority of the English chancery to restrain corporate violations injuring or tending to injure public welfare, or to defeat public policy, at the suit of the attorney general . . . is now beyond controversy." 35 Wis. at 529. The court continued: "The grounds on which

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"visitors" or "regulators" as the law of visitation developed in the mid-Nineteenth Century. *See* 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* 529 (2d ed. 1908) ("The United States, through the action of [C]ongress, and perhaps a majority of the states, through their legislatures, have provided [railroad] commissions, and invested them with a visitorial power, and have given them almost unlimited authority in the regulation and control of these corporations."); *id.* at 556 (power "exercised by congress and the several states, extends to the minutest details of the banking business.").

this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import." *Id.* at 530.

The sole citation by Petitioner or his amici to "th[is] leading case for visitatorial powers in equity," Pound, *supra*, at 380, is a fleeting parenthetical description in one amicus brief describing the case as "upholding visitorial power of the Attorney General to proceed for corporation violation of charter." CFHC Br. 9. Such a description is, at best, incomplete and, for present purposes, inaccurate.

The *Railway Companies* case found that the attorney general "appl[ies] for the writ on behalf of the public," 35 Wis. at 531, "to correct abuses and save the rights of the people," *Id.* at 572. The court confirmed that the state attorney general's visitorial authority included enforcement of generally applicable laws against corporations: "We have held that here is positive violation of positive public law to positive public injury, and that we have jurisdiction of this writ, as a prerogative writ, to restrain it." *Id.* at 595.

The *remedy* the state attorney general sought in the *Railway Companies* case was forfeiture of the companies' charters, but that does not change the nature of the *violation* that the state attorney general sought to correct. The *Railway Companies* case dealt with whether the corporations had violated state-mandated "maximum rates," *id.* at

553, which is a matter concerning the companies' *external* activities.

In *Attorney General v. Albion Academy*, 52 Wis. 391 (1881), the Wisconsin Supreme Court confirmed that "the *Railway Companies* doctrine" provides that the state attorney general has authority to police public wrongs. *See id.* at 394 ("the attorney general may sue in respect to the *public* injury, although a private person may also sue in respect to his *private* injury"). The opinion makes clear that Albion Academy was a private for-profit corporation, and therefore was subject to public visitation via the attorney general for public wrongs. *See infra* Part II.C.[9]

These cases further undermine Petitioner's argument that, as a matter of historical practice, visitation of civil corporations was limited to the corporation's internal affairs.

C. The Court Should Reject Petitioner's Attempt To Confuse Public And Private Visitation.

If the Court addresses the common-law meaning of "visitation," it should decline Petitioner's invitation to conflate *private visitation* of charities and ecclesiastical institutions with *public visitation*

[9] The court held that the corporate violation at issue in *Albion* – the illegal issuance of corporate shares in violation of the corporation's charter – was not a public wrong and therefore was outside the attorney general's visitorial authority. *See id.* at 395.

of civil corporations. *See* Pet. Br. 25; *see also* CFHC Br. 5-6. Private visitation addressed the internal affairs of an institution, while public visitation is designed to "to take care of the public interest."

It bears noting that "[c]orporations were rare before 1800; hence the case law on corporations was thin before the nineteenth century. As corporations multiplied, so did litigation over rights and duties. For all practical purposes, the courts created a body of corporation law out of next to nothing." Lawrence Friedman, "A History of American Law," *in The Business Corporation* 137 (3d ed. 2005). Petitioner and his amici nevertheless cite and rely on "[o]ld decisions and doctrines, from the time when most corporations were academies, churches, charities, and cities," even though these decisions have "little to say about managers and directors that was germane to the world of business corporations." *Id.* After 1800, "the courts slowly built up a body of rules about the internal life of corporations, and the relationships between corporations and the outside world." *Id.* at 138.

As early as 1829, Kent's *Commentaries on American Law* recognized that

> [t]here is a marked and very essential difference between civil and eleemosynary corporations on this point of visitation. . . . Civil corporations, whether public, as the corporations of towns and cities; or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to this [private] species of visitation. They are

> subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers.

Kent, *supra,* at 244.

Early corporate law treatises similarly drew a distinction between public visitation of civil corporations and private visitation of charitable institutions:

> Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest; whereas, corporations, whose object is the distribution of a private benefaction, may well find jealous guardians in the zeal or vanity of the founder, his heirs or appointees.

Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations*, § 684, at 680 (4th ed. 1852) (footnotes omitted).

Another treatise writer explained that public visitation is generally equivalent to the state's prosecutorial powers over individuals:

> § 90. **Visitorial Power** . . . . The present power of control over corporations is founded more on grounds of public policy than on any theory of succession to the rights of a prehistoric founder. *As a general rule, the state has the same control, in this regard, over corporations that it has over individuals.*

Charles B. Elliott, *A Treatise on the Law of Private Corporations* § 90, at 80 (3d ed. 1900) (emphasis added). *See also* Thompson, *supra*, at 580 ("In its visitorial capacity the state checks and controls corporate affairs, *even for the protection of those who deal with them*.") (emphasis added).

This view of visitorial power over civil corporations cannot be squared with Petitioner's narrow interpretation of visitorial power. If visitorial power over corporations were limited to "supervision of the internal affairs of corporations," CFHC Br. 6, it would fall far short of the state's control over individuals.

Petitioner's amici acknowledge "[t]he similarity between the Attorney General's method and common methods of exercising visitorial powers" but contend that "other non-visitorial powers," such as the police power, "were also exercised through inspection of records and suits to enjoin practices." CFHC Br. 19-20. The short answer to this argument is that the Attorney General's method is very similar to "common methods of exercising visitorial powers" because it *is* an exercise of visitorial power. Petitioner and his amici cannot avoid this result by contending that they are exercising "police power" rather than visitorial power. Banks historically have been so heavily regulated that the visitorial power and the police power often merged, in the banking context, such that the power to exercise superintendence over a bank was viewed as including the power to set substantive rules for the bank's conduct. *See* Thompson, *supra* at 556 ("The police power, *in its visitorial aspect*, as exercised by

congress and the several states, *extends to the minutest details of the banking business*.") (emphasis added). Thus, Petitioner derives no benefit from seeking to distinguish visitorial power from police power in the context of Section 484.

In this case, it is undisputed that Petitioner seeks to exercise examination and enforcement authority over national banks. Petitioner is seeking to examine national banks' books and records through administrative subpoenas and requests for information. Accordingly, the acknowledged "similarity between the Attorney General's method and common methods of exercising visitorial powers," CFHC Br. 19, is dispositive in this case. The OCC's exclusive visitorial powers under Section 484(a) are controlling here.

D. Preemption Under The National Bank Act Does Not Turn On Whether A State Banking Regulation "Externalizes Costs."

Petitioner's amicus argues that Petitioner's actions are not preempted by federal law because they "generate costs and benefits only within the state and do[] not threaten to create external costs." CFHC Br. 29. The "externalities" inquiry proposed by Petitioner's amicus is irrelevant under this Court's decisions determining the scope of preemption under the National Bank Act. It is also erroneous on its own terms.

An inquiry into "external costs" is irrelevant for preemption purposes. As the Court held in *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S.

373 (1954), when "[t]here appears to be a clear conflict between the law of New York and the law of the Federal Government[, w]e cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, . . . it must give way to contrary federal policy." *Id.* at 378-79. Applying these principles, the Court held in *Franklin National Bank* (and in other cases), that the state law at issue was preempted without inquiring into whether it imposed costs in other states.

Moreover, the "externalities" argument fails on its own terms because it ignores the economic reality that Petitioner's actions impose costs on the national bank generally and thus affect the national bank's operations in all states. As a matter of policy, Congress and the OCC have chosen coordinated and uniform enforcement of applicable state law by a federal regulator to reduce the risk that politically motivated state prosecutorial authorities will seek to reap local windfalls from national banks, thereby externalizing the costs of such enforcement actions to the national bank's out-of-state customers and shareholders. That policy choice is reflected in the text and structure of multiple provisions of federal banking law, including Section 484.

CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in Respondents' briefs, the judgment should be affirmed.

Respectfully submitted,

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